Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1998

NURAINI B. ABIOYE,

Petitioner

-v-

SUNSTRAND CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE THE APPELLATE COURT HAS IMPROPERLY UTILIZED THE MCDONNELL DOUGLAS EVIDENTIARY FRAMEWORK IN AGE DISCRIMINATION CASES.

2. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE THE COURT FAILED TO UTILIZE THE MIXED MOTIVE EVIDENTIARY STANDARD UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e et. seq. AND THE CIVIL RIGHTS ACT 1991, 42 U.S.C. § 1981a.

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Seventh Circuit is set forth in Exhibit A, p. 1a and reported at 154 F 3d 364. The judgment of the United States District Court for the Northern District of Illinois, Western Division is Exhibit B, p. 11a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. § 1254. The United States Court of Appeals for the Seventh Circuit issued its Opinion in this case on December 28, 1998. No request for rehearing was made. This Petition is timely filed within 90 days of the Opinion.

CONSTITUTIONAL, STATUTORY AND ORDNANCE PROVISIONS

1. 29 U.S.C. § 623(a) provides:

> "It shall be unlawful for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter."

2. The Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(a) a provides:

"It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

3. 42 U.S. C. § 2000e-2(m) provides:

"...an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

4. 42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. 42 U.S.C. § 1981 provides:

"(a) All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State Law."

STATEMENT OF THE CASE

On February 13, 1996, Plaintiff, Nuraini B. Abioye filed a two count complaint against Defendant, Sundstrand Corporation (Sundstrand), alleging that he was terminated from his employment in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623 et. seq. and because of his race and national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and the Civil Rights Act of 1991, 42 U.S.C. § 1981a, Rec. 1 at 1-2.[1]

The case proceeded on a timely schedule, as no contested discovery motions were brought. Defendant brought a motion for summary judgment on or about April 8, 1997. The motion was contested and Plaintiff filed a response to

[1] . Rec cites are to the actual record should the Court desire to review it.

Defendant's Motion on or about June 10, 1997. Plaintiff's response included a 12 (n) Statement, and affidavits of Plaintiff, Jay Vaidya and Alex Krinikas. Defendant filed a Motion to Strike Plaintiff's 12(n) Statement on or about July 28, 1997. On August 26, 1997, the District Court granted in part and denied in part Defendant's Motion. On September 5, 1997, Plaintiff filed a Motion to Reconsider the Court's Order of August 26, 1997, as well as Plaintiff's Amended 12(n) Statement. On September 9, 1997, the court denied Plaintiff's Motion to Reconsider. On September 26, 1997, the Defendant filed another Motion to Strike Plaintiff's 12(n) Statement. Plaintiff filed a Response to Defendant's Motion to Strike on or about October 2, 1997. The District Court issued a ruling on October 10, 1997, granting in part and denying in part Defendant's Motion. On October 20, 1997, the Defendant filed a response to Plaintiff's 12(n) Statement. On December 23, 1997, the District Court issued its Memorandum Opinion and Order granting Defendant's Motion for Summary Judgment. Plaintiff filed a timely Motion to Reconsider on January 2, 1998. The District Court denied Plaintiff's Motion to Reconsider on January 6, 1998. Plaintiff filed a timely Notice of Appeal on January 20, 1998.[2]

This matter was before the United States Court of Appeals for the Seventh Circuit where Plaintiff appealed the decision of the District Court. Plaintiff argued before the Appellate Court that the District Court erred in granting summary judgment for Defendant because Plaintiff had presented more than enough evidence to show discrimination and also challenged the use of the *McDonnell Douglas v. Green,* 411 U.S. 792, (1973), evidentiary framework used by the Seventh Circuit Court of Appeals and the rest of the Appellate Circuits. The Seventh Circuit Court of Appeals heard oral

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[2] Rec 1 at 1-10.

arguments on November 6, 1998, and decided the matter on December 28, 1998.

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN AFFIRMING SUMMARY JUDGMENT BECAUSE THE APPELLATE COURT IMPROPERLY UTILIZED THE MCDONNELL DOUGLAS EVIDENTIARY FRAMEWORK TO AGE DISCRIMINATION CASES.

A. The Appellate Court Erred In Utilizing The McDonnell Douglas Evidentiary Framework In Age Discrimination Cases.

The District Courts of Illinois and its Appellate Circuit Court erred in utilizing the *McDonnell Douglas* evidentiary framework to age discrimination cases without proper authority from the United States Supreme Court or the United States Congress. In *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 608, 134 L. Ed. 2d 433, 116 S. Ct. 1307 (1996), Justice Scalia has stated that the use of the McDonnell Douglas evidentiary framework to age discrimination claims has never been decided as a correct application. The Appellate Courts have applied *McDonnell Douglas* but they are different in their approach as to what *McDonnell Douglas* is or is not.

> "In assessing claims of age discrimination brought under the ADEA, the Fourth Circuit, like others, has applied some variant of the basic evidentiary framework set forth in

> *McDonnell Douglas*. We have never had occasion to decide whether that application of the Title VII, rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it. Cf. *St. Mary's Honor Center, supra* at 506, n. 1, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (assuming that "the McDonnell Douglas framework is fully applicable to racial-discrimination-in-employment claims under 42 U.S.C. § 1983 [42 U.S.C. § 1983])."

This Court has never given its permission or its formal approval of the use of *McDonnell Douglas* evidentiary framework in age discrimination cases. As late as 1994, the U.S. Congress made revisions to the ADEA and yet, they did not provide for the usage of the *McDonnell Douglas* framework to ADEA cases. There is no authority by this Court that the circuits are to use *McDonnell Douglas* and in fact they are separated as to how to apply it, if it does apply.

B. The Appellate Courts Are In Disagreement As To The Proper Evidentiary Requirements To Establish A Prima Facie Showing Under McDonnell Douglas.

The Appellate Courts are at odds as to what constitutes the elements of the *McDonnell Douglas* framework. The courts vary as to the evidentiary requirements for the second prong and pretext under the *McDonnell Douglas* framework. The circuits are varied as to which pretext standard should be utilized: pretext only; pretext plus; or permissive pretext, in order to establish a prima facie showing under *McDonnell Douglas*. This Writ is necessary to provide the

final authority as to whether *McDonnell Douglas* applies to ADEA cases, and if so, the proper application.

Court of appeals remain divided over how to apply this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). The question is whether this Court has set forth a "pretext-plus" standard, "permissive pretext" or "pretext only". Justice Scalia's language in *Hick's* has left the courts divided and the appellate circuits applying the aforementioned standards. In *Hick's*, Justice Scalia tells us that a plaintiff must show not only that the employer's "articulated, nondiscriminatory reason" is false, but also that the real reason for the employers decision was discrimination. *Id.* In the same opinion he also states that "[t]he fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a *prima facie case*, suffice to show intentional discrimination." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

The circuits have varied in their approaches in applying *Hicks*. The Third Circuit has adopted the pretext only position. *See Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067,1078 (3d Cir.) (en banc), cert denied 117 S. Ct. 2532 (1997). "A plaintiff may survive summary judgment (or in this case judgment as a matter of law) if the employer's proffered reasons were not its true reasons for the challenged action." The en banc decision held it was not necessary for the plaintiff to provide more evidence of discrimination once the finder of fact rejects the employer's explanation. Under this "pretext only" standard, Plaintiff in the instant case would survive summary judgment.[3]

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[3] See Section C of Plaintiff's Brief.

The Fourth Circuit, in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 134 L. ed. 2d 433, 117 S. Ct. 608 (1996), held that stray or isolated comments were not sufficient to create a jury issue of age discrimination. There, the Fourth Circuit states that a "plaintiff bears the ultimate burden of proving both that the employers asserted reason was pretextual and that the plaintiff's age was the true reason for the challenged employment decision." (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, at 515-17, 113 S. Ct. 2742 at 2752). The court unfairly treated the age-based comments as having no probative value. The age comments are relevant as part of a circumstantial case. But, the Fourth Circuit Court ignored the statements as circumstantial evidence. Yet in *McDonnell Douglas,* the Supreme Court itself cautioned against applying the circumstantial evidence frame work in a "rigid, mechanized or ritualistic" fashion. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981). By ignoring the use of the comments as circumstantial evidence, and viewing the plaintiff's evidence as a whole, the court has pigeon-holed a plaintiff's evidence as relevant only as direct evidence.

The Sixth Circuit, in *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir.1997), has held that this Court has rejected both the pretext only standard and the pretext plus standard in its opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 at 509, 511 n. 4, 113 S. Ct. at 2748, at 2749 n. 4. The Sixth Circuit has offered a detailed examination of *Hicks* as well as approaches by other circuits, in reaching its conclusion that the Supreme Court has directed a permissive pretext approach.

The Eighth Circuit, in *Ryther v. KARE*, 108 F.3d 832 (8th Cir. 1997), cert. denied, 117 S. Ct. 2510 (1997), upheld a

jury's finding of age discrimination on the grounds that the jury could infer pretext where the supervisor's explanation of the good evaluations she gave plaintiff was her fear that he would "fall apart" if she gave him a bad evaluation. The Court discussed extensively the issue of pretext. The Court pointed out that according to *Hicks*, "rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination and ...'[n]o additional proof of discrimination is required.'" *Id.* at 838, n. 5 (citing *Hicks*, 509 U.S. at 511, 113 S. Ct. at 2749). Under this standard, Plaintiff in the instant case has presented sufficient evidence to successfully overcome summary judgment.[4]

The pretext only position has been approved by the Ninth Circuit. *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995), cert. denied, 116 S. Ct. 1262 (1996); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1996), cert. denied, 118 S. Ct. 369 (1997). The Court articulated that a plaintiff proves pretext by producing evidence to allow a reasonable fact finder to conclude either: (1) that the alleged reason for the employee's discharge; or (2) the true reason for his discharge was a discriminatory one. *Nidds*, 113 F.3d at 918, (citing *Warren*, 58 F.3d at 443 (stating that the plaintiff "must produce evidence of facts that either show a discriminatory motive or show that the [employer's] explanation for his rejection is not credible").

The Eleventh Circuit has rejected the prextext-plus proof of age discrimination used in the Seventh Circuit. *See cf., Combs v. Plantation Patterns*, 106 F.3d 1519, 1532 (11th Cir. 1997). The Court pointed out that a plaintiff needs to merely raise a question of fact about the employer's reasons for discharge in order to defeat a motion for summary

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[4] See Section C of Plaintiff's Brief.

judgment. Again, under this standard Aboiye would meet his burden.[5]

The Seventh Circuit's opinion in this case states that "[w]hen the defendant has proffered an explanation for termination that the court determines to be nonpretextual, the court may avoid deciding whether the plaintiff has met his prima facie case and instead decide to dismiss the claim because there is no showing of pretext. *See Equal Employment Opportunity Comm'n v. Our Lady of the Resurrection Med. Ctr.*, 77 F.3d 145, 149-50 (7th Cir.1996)....In demonstrating pretext, a plaintiff must show more than that the employer's decision was incorrect; plaintiff must also show the employer lied about its proffered explanation. *See Russell v. Acme-Evans Co.*, 51 F.3d 64, 68 (7th Cir. 1995). Even an employer's erroneous decision making, exhibiting poor business judgment, is not sufficient to establish pretext. *See Richter v. Hook-SupRx, Inc.*, 142 F.3d 1024, 1031-32 (7th Cir. 1998)."

It should be noted that under the Seventh Circuit's approach to pretext, there is very little chance a plaintiff could prove discrimination under *McDonnell Douglas* unless he/she possessed direct evidence of discrimination. Under the foregoing analysis, a defendant could easily overcome any doubt the plaintiff could cast on its nondiscriminatory reason by just rephrasing or stating its case as erroneous, or poor business judgment. The approach by the Seventh Circuit seems to be one that is at odds with this Court's directives in *Hicks* and *McDonnell Douglas*.

In fact, the Seventh Circuit has all but rejected any evidence a plaintiff could provide. In *Rabinovitz v. Pena*, 89 F.3d 482, 487 (7th Cir.1996), the Seventh Circuit has

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[5] See Section C of Plaintiff's Brief.

completely shut off any opinion evidence a plaintiff can offer as to his own job abilities. Such opinion "carries no weight in showing he performed up to legitimate expectations."[6] This also is problematic for any plaintiff's rebuttal of a defendant's opinion of plaintiff's work. This completely throttles a plaintiff's ability to prove the second prong of the *McDonnell Douglas* approach. As this Court is probably aware, it is the employer who holds the records, the employees files and additional paperwork during the course of employment. If an employer is discriminating against one of its employees, what difference would it make to the employer to cover it up with falsehoods such as written and oral statements. Of course, the majority of employers would not condone such activity but we know that even our modern humanity is quite capable of lying, cheating and falsifying. Here, the District Court did not even bother to get past the second prong of the *McDonnell Douglas* framework. In implementing the current evidentiary approach, the District Court and the Appellate Court of the Seventh Circuit, are making credibility judgments as to whether a plaintiff has performed up to the employer's legitimate expectations.

Further, the Seventh Circuit has not only rejected opinion evidence of plaintiffs, but also opinion evidence of prior supervisors, employee's mentors and co-workers. *Rabinovitz v. Pena,* 89 F.3d 482 (7th Cir. 1996). In doing so, the District Court and the Appellate Court have again made credibility judgments as to the testimony and opinions of both the defendant and the plaintiff's witnesses. Further, in summarily rejecting opinion evidence of mentors, co-workers and former supervisors, the courts have in affect concluded that the employer's proffered reasons for discharge are true, unless an employee has direct evidence of defendant's statements to

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[6] See Exhibit A at 20a.

the contrary. This distortion of the *McDonnell Douglas* burden shifting method, undermines the Supreme Court's intent to allow plaintiffs' to use indirect evidence. The employee is not in the position to have records of the employee's work history or to be privy to defendant's comments and thoughts. As Judge Posner explained, in *Riordan v. Kempers*, 831 F.2d 690, 697-698 (7th Cir. 1987):

> "because most employment decisions involve an element of discretion, alternative hypotheses will always be possible and often plausible. Only the very best workers are completely satisfactory, and they are not likely to be discriminated against the cost of discrimination is too great. The law tries to protect the average worker and even below-average workers against being treated more harshly than would be the case if they were of a different [protected class], but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for both hiring, or firing, or failing to promote, or denying a pay raise to a worker who is not superlative."

Id.

Yet, when considering the evidence which the Seventh Circuit requires in order to establish an employer's proffered reason for discharge is pretextual, there is no protection for the average or below average employee who does not establish direct evidence of discrimination. Further, the evidentiary requirement does not protect even the best employees, who's employers files reflect a "concocted" plausible reason for discharge. Under the current pretext-plus standard in the

Seventh Circuit, the easily concocted plausible reason for firing is accepted as true despite opinion evidence of the plaintiff, co-workers, mentors and former supervisors to the contrary.

The pretext prong of the *McDonnell Douglas* burden shifting test has been so narrowly applied as to render it ineffective for plaintiffs. In *Hartley v. Wisconsin Bell*, 124 F.3d 887 (7th Cir. 1997) (citing *McCoy v. WGN*, 957 F.2d 368, 373 (7th Cir. 1992), the court narrows pretext to any "foolish or trivial or even baseless" reasons are enough for an employer to show a legitimate nondiscriminatory reason for discharge, if the defendant honestly believes them. *Id.* This taken in conjunction with the courts disapproval of plaintiff's own opinion evidence and opinion evidence of co-workers, mentors, and former supervisors, again forces the plaintiff to prove discrimination with direct evidence only. This is a misapplication of *McDonald Douglas* Formula. The Supreme Court has not enunciated this standard used in the Seventh Circuit.

As stated, the *McDonnell Douglas* burden shifting test was adopted in order to allow employees to establish a case of discrimination using indirect evidence. In order to allow for plaintiffs to use the indirect evidence method, the Court should subscribe to the pretext only standard, as applied in the Third Circuit. "A plaintiff may survive summary judgment (or in this case judgment as a matter of law) if the plaintiff produced sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reason for the challenged action." *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1067, 1078 (3d Cir.) (en banc), cert. denied 117 S. Ct. 2532 (1997). Once the plaintiff has set forth evidence for which a fact finder would

reject the defendant's proffered reason, then the plaintiff may avoid summary judgment. This is the proper standard for summary judgment, because it allows the trier of fact to draw an inference whether the evidence taken as a whole rises to the level of discrimination.

C. The United States Court Of Appeals For The Seventh Circuit Erred In Affirming Summary Judgment In The Instant Case, Because The Court Misapplied The McDonnell Douglas Evidentiary Framework.

As previously pointed out, the United States Appellate Court of Appeals for the Seventh Circuit has misapplied the *McDonnell Douglas* burden shifting method. Specifically, in the instant case, the District and Appellate Court erred in granting summary judgment for Defendant, due to this misapplication. Plaintiff, Aboiye, set forth sufficient circumstantial evidence of discrimination, utilizing *McDonnell Douglas*, in order to avoid summary judgment. The District and Appellate Court erred, because Plaintiff set forth a series of activities for which a finder of fact could reasonably infer that Defendant's proffered reason for discharge was not its true reason.

Plaintiff submitted various performance reports, annual raises and affidavits from co-workers, mentors, and past supervisors to establish his satisfactory work performance. Yet, the Court dismissed the evidence as insufficient, to overcome summary judgment. Jay Vaidya, Plaintiff's former supervisor and mentor at Sundstrand Corporation, set forth that he worked with Plaintiff at Sundstrand and noted Plaintiff's work product and skills as an engineer to by extremely well.[7]

[7] Vaidya Affidavit ¶¶ 6-8.

Further, a co-worker noted that Plaintiff was competent and effective in doing his job.[8] The Court found Plaintiff's evidence that his supervisor failed to place Plaintiff in a program where he was lead man because the other engineers were not ready to take orders from him, as inconsequential (all the engineers where white).[9] From 1989 to the time he was discharged, Plaintiff was loaned out to other departments to complete work.[10] Yet, unlike other employees, upon completion of projects, Plaintiff was not allowed to automatically come back to his department.[11] Plaintiff also set forth evidence of disparity in the evaluation process and testing.[12] The Appellate Court incorrectly found this evidence insufficient to overcome summary judgment.

The Appellate Court in rejecting the above evidence, has established a pretext-plus standard of review which is contrary to the original intent of the *McDonnell Douglas* test. The pretext prong of the *McDonnell Douglas* burden shifting test has been so narrowly applied as to render it ineffective for almost any plaintiff. Plaintiff in the instant case, has established under the *McDonnell Douglas* test, sufficient evidence to raise a genuine issue of fact as to whether the employer's proffered reasons were not its true reason for the discharge. Therefore, the Appellate Court erred in granting summary judgment in favor of Defendant.

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[8] Krinickas affidavit ¶¶ 7-9.

[9] Plaintiff's 12(n) ¶ 80.

[10] Plaintiff's 12(n) ¶ 81.

[11] Plaintiff's 12(n) ¶ 81.

[12] Plaintiff's 12(n) ¶ 82.

II. THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE COURT FAILED TO UTILIZE THE MIXED MOTIVE EVIDENTIARY STANDARD UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e et. seq. AND THE CIVIL RIGHTS ACT OF 1991, 42 U.S.C. § 1981.

A. The Seventh Circuit Court of Appeals Has Improperly Articulated The Standard of Review For A Mixed Motives Case Under Title VII Of The Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq. And The Civil Rights Act of 1991, 42 U.S.C. § 1981.

A "mixed motives" case is one in which an employment decision is made based on a mixture of legitimate and illegitimate motives. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). The Court has held that once a plaintiff establishes that discrimination played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed discrimination to play a role. *Id.* at 1787. After *Price Waterhouse*, the 1991 Amendment of Title VII clarified the mixed motive test. The Civil Rights Act of 1991, 42 U.S.C. § 2000e- 2(m); *Landgraf v. USI Film Products*, 511 U.S. 244, 251, 128 L. Ed. 2d 229, 114 S. Ct. 1483, 1489 (1994). The Amendment added a subsection which states in part,

> "...an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any

> employment practice, even though other factors also motivated the practice."

Id.

Under the mixed motive test, if the defendant demonstrates that the employee would have been discharged despite the discrimination, then the employee may still be awarded declaratory relief, injunctive relief and attorney's fees and costs. 42 U.S.C. §2000(e)-5(g)(B)(i).

The District Court and the Appellate Court have improperly articulated the mixed motive standard and erred in failing to apply the mixed motive standard to the instant case. The Appellate Court for the Seventh Circuit stated in the case that summary judgment in favor of the employer is warranted in a mixed motive case if there is "the presence of any acceptable motive" for the discharge.[13] Yet, this is not the standard articulated in the Statute. The very nature of a mixed motive case invokes both discriminatory reasons and legitimate reasons for the employment decision. The Statute states the plaintiff needs to show that "even though other factors motivated the practice" that discrimination was also a motivation. *See* 42 U.S.C. § 2000(e)-5(g)(B)(i). Based on the Appellate Court's misinterpretation of the mixed motive standard, the Court summarily dismissed the test as viable in the case. Therefore, the Appellate Court failed to apply the mixed motive test to the instant case and erred in granting summary judgment.

It should be further noted, that the District Court failed to even consider a mixed motives analysis. The Court below articulated that mixed motives under *Price Waterhouse*

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[13] Exhibit A at 18a.

v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989), did not survive the Civil Rights Act of 1991 and therefore did not even consider the analysis.[14]

B. The United States Court Of Appeals For The Seventh Circuit Erred In Affirming Summary Judgment In The Instant Case, Because The Court Failed To Utilize The Mixed Motive Evidentiary Standard.

Here, the court's below failed to even consider the evidence presented by Plaintiff. It is clear that the evidence has shown a pattern of discriminatory treatment starting with Plaintiff's evaluations that were changed by management. Also, Plaintiff was not allowed to return to his original electrical engineering group after being loaned out to another group within the department at Sundstrand Corporation,[15] even though the practice and pattern was to allow an employee to always returned to his original group after being loaned out.[16] Here, Plaintiff was lent to "Research-Electrical Group," yet he could not be promoted nor transferred back to his original Electric Power Group. Then he was sent to "Electronic Test Equipment Group" and again he was not allowed to return to his original Electrical Power Group.[17] This practice was contrary to established practice at Sundstrand.[18] This also showed that a black employee(Plaintiff) was treated differently than his Caucasian counterparts. Further, Plaintiff was forced to take a "test" while less senior, Caucasian engineers supervised him. These same less senior, Caucasian

[14] Exhibit A at 18a.

[15] Plaintiff's 12(n) ¶ 81.

[16] Plaintiff's 12(n) ¶ 80.

[17] Aboiye Affidavit ¶ 18.

[18] See Vaidya's Affidavit ¶ 1; Alex Krinickas's Affidavit, ¶ 11.

engineers were allowed to take the same test home.[19] "Peer reviews" were done on Plaintiff, but Plaintiff was not allowed to participate in peer reviews of other employees. This was also contrary to the policy and purpose of "peer reviews".[20] Evidence was presented, that Loren Radamaker, a Caucasian employee, had a major project failure costing Defendant thousands of dollars and man hours, yet he was not even disciplined, let alone terminated.[21] Plaintiff never had a project failure,[22] was never disciplined, and was not considered a problem employee. No other engineer were subjected to this treatment or terminated under Plaintiff's circumstances. Similarly situated younger Caucasian engineers were kept, while Plaintiff was terminated.[23]

The above described employment practices can also be described as disparate impact policies. 42 U.S.C. § 2000 (e)(2)(K)(1)(A)(i). No other engineers of color, race or national origin were subjected to the aforementioned employment practices, that Plaintiff had been subjected to. Yet the treatment obviously had a disparate impact upon Plaintiff. The use of the "test" clearly had a disparate impact on people of color-black, their national origin-Nigerian and race-African.[24] Defendant can not articulate the practice is job related and a business necessity. The court should look to the totality of the evidence raised and find the trial court erred in its application of the law and find Plaintiff has set forth material issues of fact sufficient to overcome summary judgment.

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[19] Plaintiff's 12(n) ¶ 82.

[20] Aboiye Affidavit ¶ 24.

[21] Aboiye Affidavit ¶ 33.

[22] Aboiye Affidavit ¶ 33.

[23] Krinickas Affidavit ¶ 15.

[24] Aboiye Affidavit ¶ 35.

When this Court looks at Plaintiff's facts, there can be little doubt that his treatment was because of his race, and national origin in violation of Title VII. The totality of the evidence shows that impermissible factors were used to terminate Plaintiff. Even if Defendant discharged Plaintiff for some legitimate reason, its underlying motivation was tainted. Therefore, Defendant is liable for all of the proscribed relief under the Statute.

CONCLUSION

The Court of Appeals for the Seventh Circuit has misapplied the *McDonnell Douglas* burden shifting method in the instant case. Further, the Appellate Court improperly articulated the mixed motive standard and erred in failing to apply the mixed motive standard in this case. The Court should grant certiorari to review and reverse the Seventh Circuits application of the *McDonnell Douglas* and mixed motive evidentiary framework. Also, the lack of uniformity among the several Circuits in applying the *McDonnell Douglas* framework needs to be resolved in order to provide a uniform standard for all the circuits.

Respectfully submitted,

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(815) 544-4219

(Any Footnotes trail end of each document)

NURAINI B. ABIOYE, Plaintiff-Appellant, v. SUNDSTRAND CORPORATION, Defendant-Appellee.

No. 98-1157

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

November 6, 1998, Argued
December 28, 1998, Decided

COUNSEL: For NURAINI B. ABIOYE, Plaintiff - Appellant: Rene Hernandez, Belvidere, IL USA.

For SUNDSTRAND CORPORATION, Defendant - Appellee: Kearney W. Kilens, MCDERMOTT, WILL & EMERY, Chicago, IL USA. Max G. Brittain, Jr., BRITTAIN, SLEDZ, MORRIS & SLOVAK, Chicago, IL USA.

JUDGES: Before RIPPLE, KANNE and DIANE P. WOOD, Circuit Judges.

OPINIONBY: RIPPLE

OPINION: RIPPLE, Circuit Judge. Nuraini Abioye filed this action against Sundstrand Corporation ("Sundstrand" or "the Corporation"). He alleged that his employment was terminated because of his age, race and national origin in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act ("ADEA"). After striking portions of Mr. Abioye's 12(N) Statement and supporting affidavits, the district court granted Sundstrand's summary judgment motion. Mr. Abioye seeks review of these

determinations. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts

Mr. Abioye, who is a black man from Nigeria and who was fifty-two at the time of his termination, began working as an engineer for the Corporation's aerospace division in 1979. In 1984, he was promoted from the position of Project Engineer II to the position of Senior Program Engineer I. In 1987, he was promoted to Senior Program Engineer II. From June 1989 to January 1990, Mr. Abioye worked on special assignment to the research department. When that assignment expired, he was transferred to the test department to work on projects that needed additional staffing. From January 1990 to September 1993, Mr. Abioye worked in the test equipment group. During that time, Mr. Abioye was assigned to work on the 777 backup project. This assignment was completed in 1992, and he was then assigned to perform day-to-day work on a variety of projects.

During the 1992-93 period, Mr. Abioye was identified as a possible candidate for layoff as part of a general reduction in force due to a slowdown in the Corporation's business. At the request of the layoff committee, one of his managers, Ray Dawson, a black man over the age of forty, attempted to assist Mr. Abioye in obtaining a transfer to the electric power group. Ron Peterson, director of engineering at that time, stated that he had no openings, and he questioned whether Mr. Abioye had the skills necessary for the transfer.

In June 1993, two of Mr. Abioye's managers, Barry Mendeloff and Doug Rinker, reviewed Mr. Abioye's performance. They then told Mr. Abioye that he needed assignments

outside of the test equipment group to continue performance at the Senior Engineer II level and that they were working with the human resources department to secure such opportunities for him. They also informed him that, if he was not transferred, he was in danger of being terminated. The review further advised Mr. Abioye that his mix of technical knowledge and skills did not meet the requirements for a Senior Engineer II in test equipment and that he needed to improve his performance. Notably, Mr. Abioye did not dispute the assessment of these managers. During a discussion of the review, Rinker and Mendeloff told Mr. Abioye that they were trying to place him in the electric power department because of his work experience. Mr. Abioye agreed with this course of action and expressed a desire to transfer to electric power.

Despite the facility-wide downsizing then in progress, efforts continued to find a place for Mr. Abioye in electric power and Mr. Abioye continued to express an interest in such a placement. Finally, in September 1993, Mr. Abioye was transferred into the motor generator engineering group, which George Seffernick managed and which was a subgroup of the electric power group. Seffernick viewed Mr. Abioye as technically weak and in need of work to regain skills. Seffernick told Mr. Abioye that he would need to work hard to keep up with assignments.

Mr. Abioye's first assignments were on the AWACS program and the F22 program. Seffernick received feedback from internal customers and from project managers who supervised Mr. Abioye about concerns with his level of performance. Seffernick had several discussions with Mr. Abioye about his performance throughout 1994. According to Seffernick, Mr. Abioye reacted negatively to this criticism when it was conveyed to him. In June 1994, Seffernick rated Mr. Abioye's performance as a 2 ("met some commitments") on a scale of 1

to 5. Mr. Abioye, upon receiving the evaluation, stated that Seffernick was not qualified to evaluate him.

During 1994, Seffernick also discussed with Virginia Dunkle of Sundstrand's human resources department ways to help Mr. Abioye bring his skills up to department expectations. In January 1994, Seffernick assigned Jay Vaidya to mentor Mr. Abioye, and assigned Mr. Abioye to help Vaidya in a design program. After completion of the program, Mr. Abioye prepared a report for marketing. Seffernick found the report to be undecipherable. He then asked a more senior engineer to evaluate the report and met with that evaluator and Mr. Abioye in an effort to improve the product. Mr. Abioye was still unable to prepare an acceptable report. After another assignment resulted in unacceptable performance, Seffernick assigned Mr. Abioye to create a flow chart of the generator process in an effort to improve his basic design skills.

In late 1994, after compiling performance evaluations and facing the need to find assignments for Mr. Abioye, Seffernick recommended to the director of engineering that Mr. Abioye be considered for layoff or transfer because his performance was unsatisfactory and because his skills were not compatible with those of the department. Consequently, in February 1995, Seffernick discussed Mr. Abioye's past performance with a layoff review panel and with the director of engineering, George Sorensen. This panel, consisting of Seffernick, Sorensen and several members of the human resources department, including a vice-president, reviewed management's expectations and Mr. Abioye's work performance. It also considered Mr. Abioye's past accomplishments and performance appraisals and examined alternatives for transfer or reassignment. After this evaluative process, Sorensen made the final decision to terminate Mr. Abioye on the ground that he lacked the technical capacity to perform the job.

B. Proceedings in the District Court

The district court struck parts of Mr. Abioye's statement as well as the affidavits of Vaidya and Alex Krinickas, who was Mr. Abioye's supervisor before Mr. Abioye joined Seffernick's group. It then granted summary judgment to the Corporation. The court held that Mr. Abioye had not demonstrated that he was meeting the Corporation's legitimate expectations. Therefore, he had not established a prima facie case under the McDonnell Douglas methodology. The court relied on the evaluation of Mr. Abioye's abilities by Seffernick and Sorensen. The court noted that Mr. Abioye's past performance evaluations and evaluations by Vaidya and Krinickas could not establish his competency at the time of his discharge. Additionally, his own statements regarding his competency were entitled to no weight. Finally, the court also noted briefly that there was no evidence of pretext in this case..

II

DISCUSSION

A.

Mr. Abioye submits that the district court should not have stricken parts of the affidavits of himself, Vaidya and Krinickas. He alleges that the excluded evidence demonstrates that the process utilized to evaluate his performance was different from the process used to evaluate white employees; that young, white engineers were brought in to replace him; that a white engineer had failed on a major project without reprimand; and that engineers in other groups received reassignment to their prior groups more easily than Mr. Abioye.

We review a district court's decision to strike portions of summary judgment affidavits for an abuse of discretion. See Whitted v. General Motors Corp., 58 F.3d 1200, 1203 (7th Cir.

1995). Although our review would have been aided by a more plenary explanation by the district court, our own review of the record allows us to conclude that there was no abuse of discretion here. The court's decision to strike these statements was not irrational or unreasonable. In particular, we note that conjecture or speculation regarding the employer's motives cannot be used to defeat a summary judgment motion; affidavits must be based on personal knowledge. See Karazanos v. Navistar Int'l Transp. Corp., 948 F.2d 332, 337 (7th Cir. 1991); Visser v. Packer Eng'g Assocs., Inc., 924 F.2d 655, 659-60 (7th Cir. 1991) (en banc); Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1571-72 (7th Cir. 1989). Here, none of the conclusory statements made by the affiants demonstrated, with sufficient particularity, that they actually knew whether younger, white employees were treated better than Mr. Abioye; their statements were merely conjecture based on rumor. In any event, even if the district court parsed the affidavits too aggressively, that error was harmless because, as will be more fully discussed below, the stricken evidence was not sufficient to show that Sundstrand's explanation for terminating Mr. Abioye--his poor performance--was pretextual.

B.

Mr. Abioye next contends that the district court erred in holding that he did not establish a prima facie case under McDonnell Douglas. More specifically, he argues that he was meeting the legitimate expectations of Sundstrand Corporation. He cites the affidavits of Vaidya and Krinickas, who were his co-workers at Sundstrand, to support his argument. Both of these co-workers state in their affidavits that Mr. Abioye was performing his job well. Because Vaidya had served as his mentor and project supervisor, Mr. Abioye claims Vaidya's evaluation is superior to that of Seffernick.

Although the district court granted summary judgment by concluding that Mr. Abioye was not meeting the performance

expectations of his employer, we think that a more surefooted ground for decision is the lack of any pretext in the Corporation's articulated reason for the termination. No matter how one might construe the affidavit of Vaidya, the district court correctly concluded that there is no evidence that Sundstrand's explanation for terminating Mr. Abioye's employment was pretextual. When the defendant has proffered an explanation for termination that the court determines to be nonpretextual, the court may avoid deciding whether the plaintiff has met his prima facie case and instead decide to dismiss the claim because there is no showing of pretext. See Equal Employment Opportunity Comm'n v. Our Lady of the Resurrection Med. Ctr., 77 F.3d 145, 149-50 (7th Cir. 1996).

In demonstrating pretext, a plaintiff must show more than that the employer's decision was incorrect; the plaintiff must also show the employer lied about its proffered explanation. See Russell v. Acme-Evans Co., 51 F.3d 64, 68 (7th Cir. 1995). Even an employer's erroneous decisionmaking, exhibiting poor business judgment, is not sufficient to establish pretext. See Richter v. Hook-SupeRx, Inc., 142 F.3d 1024, 1031-32 (7th Cir. 1998).

This court has applied these principles to a case with facts similar to this one. See Bahl v. Royal Indem. Co., 115 F.3d 1283, 1291-92 (7th Cir. 1997). In Bahl, the employer alleged that it terminated the plaintiff because of poor performance. The plaintiff, citing a supervisor's complimentary review of the plaintiff's performance, responded that the explanation was pretextual. This court held that the supervisor's review did not create an issue of triable fact that the employer's proffered explanation was a lie. The issue was whether management honestly held its views, not whether it was mistaken.

Similarly, in this case, the affidavits of Mr. Abioye's mentor, Vaidya, and prior supervisor, Krinickas, do not establish an

issue of triable fact that Sundstrand's explanation is pretextual. Sundstrand management found Mr. Abioye's work to be unsatisfactory; the fact that Vaidya thought that Mr. Abioye's work was satisfactory cannot establish that Sundstrand management's subjective explanation was a fabrication. There is absolutely no evidence to indicate that Seffernick or Sorensen were lying about their estimation of Mr. Abioye's abilities. Indeed, the evidence demonstrates that Sundstrand management had a strong basis for believing Mr. Abioye was not performing well: Evaluations and comments by various supervisors indicated that Mr. Abioye's work was inadequate, and Seffernick himself had worked with Mr. Abioye to revise an unsatisfactory report that Mr. Abioye had written. Furthermore, management attempted to accommodate Mr. Abioye's lack of proficiency by transferring him and providing him with a mentor. Finally, the entire matter of Mr. Abioye's performance had been analyzed before a panel drawn not only from those who had worked with Mr. Abioye, but also from the human resources department. This evidence hardly supports the inference that the termination was pretextual and that Sundstrand management did not actually believe Mr. Abioye was a poor performer. n1

C.

Mr. Abioye also contends that the district court should have evaluated this summary judgment motion under a "mixed motives" framework rather than the McDonnell Douglas framework. n2 Under the mixed motives approach to discrimination cases, a plaintiff may rely on either direct or circumstantial evidence to establish discriminatory intent. See Gleason v. Mesirow Fin., Inc., 118 F.3d 1134, 1140 (7th Cir. 1997). The defendant employer may then avoid a finding of liability by proving that it would have made the same decision even if the plaintiff was not of a certain race or above a certain age. See id.

Utilization of a mixed motives approach would not alter the result in this case. At the outset, as in Gleason, we do not believe that the evidence of record will support a determination that there is sufficient evidence, direct or circumstantial, of a mixed motive in this case. In any event, as in Trahant v. Royal Indemnity Co., 121 F.3d 1094 (7th Cir. 1997), it is clear that, even if we were to assume some evidence of the existence of an impermissible motive, the evidence of a "wholly legitimate reason for the employment decision" is overwhelming. Id. at 1098. The Corporation would still be entitled to summary judgment because there is no genuine issue regarding whether it would have made the same employment decision anyway. The evidence strongly establishes that Sundstrand management believed that Mr. Abioye was not qualified to continue working for Sundstrand. Sundstrand had attempted, persistently, to assist Mr. Abioye in improving his performance and in finding a position that suited his abilities. He was terminated only after the process of evaluation and search for alternative placement failed to yield a suitable result. The Corporation "has demonstrated convincingly," id., that it would have terminated Mr. Abioye no matter what his age, race, or national origin.

Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

Footnotes

n1 Mr. Abioye contends that he was required to take an examination concerning his engineering abilities under conditions different from those imposed on other employees.

Although the treatment of this issue by the district court and the parties is decidedly cryptic, we have examined thoroughly the record and do not believe that this episode raises a genuine issue of triable fact with respect to the issues of pretext, or, indeed, of mixed motives. The record does not support, in any manner, that an impermissible motive prompted the administration of the test. Moreover, when Mr. Abioye complained to management about the circumstances of administration, the test was nullified by the Corporation. Under these circumstances, the administration of the test would not support a jury verdict of discrimination.

n2 Alternatively, Mr. Abioye argues that this court should not apply the McDonnell Douglas framework to ADEA claims. However, it is well settled that the McDonnell Douglas framework applies to such claims. See, e.g., Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 1140 (7th Cir. 1998) (applying the McDonnell Douglas framework to an ADEA claim). Mr. Abioye offers no alternative mode of analysis and provides no satisfactory argument why this court should abandon prior precedent.

NURAINI B. ABIOYE, Plaintiff, v. SUNDSTRAND CORPORATION, Defendant.

No. 96 C 50038

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

December 23, 1997, Decided
December 23, 1997, Filed

COUNSEL: FOR PLAINTIFF: Rene Hernandez, Attorney at Law, Belvidere, IL.

FOR DEFENDANT: Max G. Brittain, Jr., Kearney Wood Kilens, Christine Anne Greener, Brittain, Sledz, Morris & Slovak, Chicago, IL.

JUDGES: PHILIP G. REINHARD, JUDGE, UNITED STATES DISTRICT COURT.

OPINIONBY: PHILIP G. REINHARD

OPINION: MEMORANDUM OPINION AND ORDER

INTRODUCTION

Plaintiff, Nuraini B. Abioye, filed a two-count complaint against defendant, Sundstrand Corporation, alleging that he was terminated from his employment in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626 and because of his race and national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. and the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Jurisdiction is premised on 28 U.S.C. § 1331, and venue is proper as the complained of conduct arose in this district and division.

Defendant has moved for summary judgment as to plaintiff's entire complaint.

FACTS n1

Plaintiff began working for defendant's aerospace division in Rockford, Illinois, in 1979. In 1984, he was promoted from project engineer II to senior program engineer I in the aerospace generator group. In June 1987, he was promoted to senior program engineer II in the research department. Plaintiff received periodic pay increases during the time he was a senior program engineer II.

Plaintiff worked on special assignment to the research department from June 1989 to January 1990. Upon the expiration of that special assignment, plaintiff was transferred to the test equipment department to work on projects that needed additional staffing. Plaintiff worked in the test equipment group from January 1990 to September 1993. During this period, plaintiff was assigned to work on the 777 backup project. He completed that assignment at the end of 1992. For the remainder of his time in test equipment, plaintiff performed day-to-day work with engineers on their projects.

During the 1992-93 time period, plaintiff, along with other employees in the test equipment group, was identified as a possible candidate for a general reduction in force being implemented due to a slow down in business. Although plaintiff was identified as such a candidate, he was not laid off at that time. Ray Dawson, a black man over the age of forty, who was one of plaintiff's managers, was asked by a layoff review committee to investigate plaintiff's work and performance history, which he did. During this time, Dawson and Brian Hayes, Dawson's counterpart in human resources, unsuccessfully assisted plaintiff in attempting to obtain a transfer to the electric power group. Ron Peterson, the director of

engineering at that time, told Dawson there were no openings and that he would have to displace someone if plaintiff transferred. Peterson questioned whether plaintiff's abilities warranted such a displacement. Dawson continued to have contact with plaintiff and to help him remain employed.

In June 1993, two of plaintiff's managers, Barry Mendeloff and Doug Rinker, provided a performance review of plaintiff to plaintiff. As part of the review, plaintiff was advised that he needed assignments outside of the test equipment group to continue to perform at a senior engineer II level and that Rinker and Mendeloff were working with human resources to obtain a transfer for plaintiff. The review also cautioned that if a transfer did not develop, plaintiff's job was in jeopardy of elimination. The review further noted that plaintiff's technical knowledge base and skill mix did not meet the requirements for a senior engineer II in test equipment and needed improvement. Plaintiff did not dispute this review with anyone. Also during a discussion of the review, Rinker and Mendeloff told plaintiff they were trying to place him back in electric power based on his work experience. Plaintiff agreed and expressed a desire to transfer to electric power.

During 1993, Mendeloff and human resources continued their efforts to transfer plaintiff to electric power. Plaintiff continued to express his interest in being transferred. The transfer was difficult to arrange because of the facility-wide downsizing going on at that time.

In September 1993, plaintiff was transferred into the motor generator engineering group, which was a sub-group of electric power. The manager of that group, George Seffernick, was responsible for supervising all generator design engineers, including plaintiff. In that capacity, Seffernick's practice was to assign engineers to projects based on the needs of the project, the engineer whose skills best match those needs and the

existing workload and availability of each engineer. Unless performance problems developed, the generator design engineer was expected to remain on the project until his assignment was completed or he or she was no longer needed.

Seffernick first met plaintiff when he interviewed him in September 1993 to assess plaintiffs capabilities to work in Seffernick's department. Seffernick knew at that time that plaintiff was slated for lay off unless Seffernick could find a position for him in his department. Seffernick considered plaintiff to be technically weak and thought plaintiff would need to work at regaining his generator design skills. Seffernick told plaintiff that he could find work for him but that plaintiff would need to work very hard to keep up with the assignment and gain the experience necessary to perform at a senior engineer II level.

Plaintiff's first assignment under Seffernick was to the AWACS program. Between September 1993 and the first quarter of 1994, plaintiff worked on various aspects of the AWACS program and the F22 program. Seffernick received feedback from internal customers and program managers (who supervised plaintiff) that there were some concerns about plaintiff's performance. According to Seffernick, plaintiff reacted negatively and defensively when Seffernick conveyed these concerns to him.

On several occasions in 1994, Seffernick discussed with plaintiff what Seffernick perceived to be weaknesses in plaintiff's skill level and performance. In June 1994, Seffernick completed a performance evaluation of plaintiff which rated plaintiff a 2 ("met some commitments") on a scale of 1 to 5. Upon receiving the evaluation, plaintiff told Seffernick that Seffernick was not qualified to evaluate his work, that he did not observe plaintiff's daily activities, that Seffernick did not know how to design a generator and that based on plaintiff's sixteen

years with defendant the rating of 2 was uncalled for. Plaintiff denies being defensive about his job skills. Several times during 1994, Seffernick consulted with Virginia Dunkle of human resources on how to help plaintiff bring his skill levels up to department expectations. As a result, in January 1994, Seffernick assigned Jay Vaidya, a former employee of defendant, to mentor plaintiff. In February 1994, plaintiff was assigned to a research and development program headed up by Vaidya and known as the 4 pole/8 pole design program.

After completion of the 4 pole/8 pole project, a report was to be prepared for marketing. Because Vaidya was absent, Seffernick asked plaintiff if he could prepare the report. When plaintiff responded he could, Seffernick gave him the assignment.

Upon receiving the report, Seffernick found it undecipherable and asked Hassan Mansir, a principal engineer (two levels above a senior engineer II), to review and comment on the report. After several meetings between Seffernick, plaintiff and Mansir, which included Mansir's input regarding the report, plaintiff was still unable to prepare a report that satisfied Seffernick. Seffernick told plaintiff he found the final report unacceptable and eventually gave up on plaintiff writing the report in an acceptable manner.

During the fourth quarter of 1994, Seffernick assigned plaintiff to work under the supervision of Mansir on a variable frequency generator program. Plaintiff made certain recommendations regarding the project which Mansir told him were unacceptable. Because problems developed with that assignment, Seffernick assigned plaintiff to create a flow chart of the generator process in an effort to improve plaintiff's basic design skills.

In late 1994, while compiling performance evaluations and faced with the need to find assignments for plaintiff, Seffernick recommended to George Sorensen, director of engineering, that plaintiff be considered for transfer or layoff because his performance was unsatisfactory and he did not have the skills to work in the department. In February 1995, Seffernick and Sorensen presented the issue of plaintiff's work status to a layoff review panel organized at Seffernick's request. The review panel consisted of Seffernick, Sorensen and several members of human resources, including Butch Barr, a human resources vice-president. Seffernick presented the panel with various examples of plaintiff's performance on different assignments and what management's expectations were. The panel also considered plaintiff's past accomplishments and performance appraisals and examined alternatives for reassignment or transfer.

Following the layoff review panel meeting, Sorensen made the final decision to terminate plaintiff. The following day, Seffernick informed plaintiff of the decision. The reason plaintiff was terminated was because of his lack of technical capability to perform the job.

Plaintiff refers to his various performance evaluations over the years and the fact that he received annual raises every year he worked as a senior engineer II as evidence of his satisfactory work performance. Plaintiff also submits the affidavits of Vaidya, who worked with plaintiff on the 4 pole/8 pole project, and Alex Krinickas, also a former employee of defendant, who supervised plaintiff in the electrical research department prior to plaintiff's working for Seffernick. n2 According to Vaidya, plaintiff "performed his responsibilities extremely well, in addition to being technically competent as an engineer." Vaidya is also critical of various evaluations performed by other of plaintiff's supervisors. Also, Vaidya states that Seffernick ignored Vaidya's evaluation of plaintiff.

Krinickas states in his affidavit that he worked with plaintiff on two occasions, the second being on a project Krinickas supervised in the electrical research department. During that time, Krinickas observed plaintiff frequently. According to Krinickas, plaintiff was competent and effective in doing his job and required very minimal supervision.

CONTENTIONS

Defendant contends it is entitled to summary judgment because plaintiff has failed to raise an issue of material fact as to two elements of the prima facie case under McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), that is, whether plaintiff performed the legitimate expectations of his job and whether defendant treated similarly situated persons not in the protected class more favorably. Plaintiff responds first that he has offered evidence of disparate treatment in that he was treated differently because he was subjected to a skills test in a manner different than all other tested engineers, that he was discriminated against in the peer review and performance review processes and that he was discriminated against in the manner in which he was terminated. He further argues that his is a mixed motive case because there were both legitimate and illegitimate motives behind his termination, therefore, making McDonnell-Douglas inapplicable. Lastly, he contends that even if McDonnell-Douglas does apply, he has submitted enough evidence to present a triable issue regarding both the prima facie case and pretext.

DISCUSSION

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S.

Ct. 2548 (1986); O'Connor v. DePaul Univ., 123 F.3d 665, 669 (7th Cir. 1997). In weighing a motion for summary judgment, the court must take the facts in the light most favorable to the party opposing the motion and draw all reasonable inferences in that party's favor. Bahl v. Royal Indemnity Co., 115 F.3d 1283, 1289 (7th cir. 1997); Condo v. Sysco Corp., 1 F.3d 599, 601 (7th Cir. 1993), cert. denied, 510 U.S. 1110, 114 S. Ct. 1051, 127 L. Ed. 2d 373 (1994). The party opposing the motion must present evidence of a triable issue of material fact. See Vance v. Peters, 97 F.3d 987, 990 (7th Cir. 1996), cert. denied, 137 L. Ed. 2d 1030, 117 S. Ct. 1822 (1997).

The first issue the court must address is plaintiff's contention that his case must be characterized as one of "mixed motives" and that it is governed by Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989). This is, at best, a curious contention as the concept of mixed motives set forth in Price Waterhouse did not survive the Civil Rights Act of 1991. Doll v. Brown, 75 F.3d 1200, 1203 (7th Cir. 1996) (Congress amended Title VII to convert mixed motive cases to no-injury cases); Pilditch v. Board of Educ., 3 F.3d 1113, 1118 n.2 (7th Cir. 1993) (Civil Rights Act of 1991 overruled Price Waterhouse as to mixed motives). What is even more curious about plaintiff's position is that application of Price Waterhouse has a greater potential to limit plaintiff's recovery as the presence of any acceptable motive is sufficient for dismissal in favor of the employer. The court, therefore, will treat this case as one under McDonnell-Douglas. n3

Under the ADEA and Title VII, a plaintiff may prove discrimination by either presenting direct evidence of discrimination or applying the burden-shifting framework from McDonnell Douglas. Rabinovitz v. Pena, 89 F.3d 482, 487 (7th Cir. 1996). As noted above, plaintiff has taken the McDonnell Douglas path in this case. Under the McDonnell

Douglas indirect, burden-shifting approach, to establish a prima facie case of discriminatory discharge, a plaintiff must show: (1) he is a member of a protected class; (2) he performed his job satisfactorily; (3) he suffered an adverse employment decision; and (4) the employer treated similarly-situated employees outside the plaintiff's classification more favorably. Oates v. Discovery Zone, 116 F.3d 1161, 1171 (7th Cir. 1997).

In this case, while defendant contends plaintiff has failed to establish the second and fourth elements of his prima facie case, the court can dispose of the motion for summary judgment based on the second element alone. If, as here, a plaintiff is totally reliant on McDonnell Douglas, his case fails if he cannot show that he was meeting his employer's legitimate expectations. Coco v. Elmwood Care, Inc., 1997 U.S. App. LEXIS 30908, No. 97-1697, 1997 WL 695406, at *2 (7th Cir. Nov. 10, 1997). If a plaintiff cannot show he was performing his job up to his employer's legitimate expectations, there is no need to consider whether the employer's proffered reason for terminating him was in fact a pretext. Id. At *3. McDonnell Douglas is for cases in which an employee is performing in a satisfactory manner but loses his job anyway and is replaced by someone belonging to a different group from his own. Id.

In this case, plaintiff has not shown that he was performing his job satisfactorily at the time he was discharged. Seffernick, plaintiff's immediate supervisor, Sorensen, Seffernick's manager, and the review panel all thought plaintiff should be let go because his skills were not adequate to perform any needed function in the workplace. While plaintiff points to some past performance appraisals and to his and two fellow employees' opinions of his abilities, such evidence does not establish his abilities to perform needed job functions at the time of his discharge. First, past performance appraisals are not

necessarily evidence of present performance. Additionally, evaluations of performance based on other assignments do not necessarily reflect the ability to perform current assignments. Furthermore, the favorable appraisals relied on by plaintiff are a bit of a wash as defendant has pointed to several appraisals that indicate poor performance. n4 Second, plaintiff's own opinion of his job abilities carries no weight in showing he performed up to legitimate expectations. See Rabinovitz v. Pena, 89 F.3d 482, 487 (7th Cir. 1996). Third, while the opinions of fellow employees are relevant to show plaintiff's job performance, the particular opinions offered here (Vaidya and Krinickas) have nothing to do with the position plaintiff was in at the time of his discharge. Cf. Rabinovitz, 89 F.3d at 487 (isolated comments by co-workers regarding a plaintiff's abilities do not demonstrate that he is better than other employees). The fact that plaintiff was able to competently perform certain jobs in the past does not bear on whether he was able to perform his present duties. This would be different if plaintiff could show his present job duties are substantially similar to those in the past, a showing he has not made here.

After seventeen years with defendant, and after surviving several reductions in force, plaintiff found himself in a position where there was simply an insufficient amount of work for which he was qualified. Management made several efforts to keep plaintiff employed by giving him various assignments which he may arguably have not been qualified to perform. The undisputed evidence shows this was done to keep plaintiff employed rather than lay him off. Unfortunately, plaintiff was unable to satisfactorily perform these assigned duties. The anti-discrimination laws do not require defendant, or any employer, to keep an employee if his skills do not meet the employer's legitimate needs. Because plaintiff has not shown that he was meeting the legitimate expectations of defendant at the time of his discharge, the court grants summary judgment in favor of defendant. While the court need not reach the

question of pretext, there is simply no evidence of pretext in this case. n5

CONCLUSION

For the foregoing reasons, the court grants defendant's motion for summary judgment and dismisses this cause in its entirety.

Footnotes

n1 The facts are taken from the parties' respective statements filed pursuant to Local General Rule 12. Defendant has filed three motions to strike, one directed at plaintiff's original Rule 12N statement, one directed at certain affidavits submitted by plaintiff and the third directed at plaintiff's amended Rule 12N, which was filed after this court struck the original Rule 12N in its entirety. The court has, in two prior orders, granted in part and denied in part the various motions to strike. Therefore, the court's rendition of facts will not consider any factual assertions, or evidence filed in support thereof, that has previously been stricken.

n2 Defendant has moved to strike the affidavits of Vaidya and Krinickas. The court will only refer to the factual assertions in the affidavits that are relevant and are otherwise properly included in an affidavit.

n3 Plaintiff has not asserted that there is any direct evidence of discrimination.

n4 Plaintiff's answer to this quandary is to assert that his poor appraisals were the product of discrimination. Such an answer fails because it is unsupported by any record evidence. The mere fact that such evaluations were completed by supervisors outside the protected class (an assumption at best) proves nothing, as some, if not all, of the good appraisals

plaintiff points to were presumably completed by supervisors outside the protected class. Plaintiff simply cannot have it both ways.

n5 While plaintiff hints that a long-term conspiracy existed whereby he was discriminatorily transferred to various positions, which eventually resulted in his being in a position he was not qualified for, thereby expediting his termination, there is absolutely no evidence of any such conspiracy by defendant. Furthermore, such a theory defies common sense. It is not remotely believable that defendant would engage in such a protracted and complex scheme just to rid itself of plaintiff. Rather, the evidence appears to demonstrate an opposite motive. Furthermore, there is no indication that during this subterfuge, which would have lasted many years, that plaintiff once ever complained about a transfer or any promotion he received.

42 U.S.C. 2000e et seq.

Sec.107.Clarifying Prohibition Against impermissible Consideration of Race, Color Religion, Sex, or National Origin in Employment of Practices.

(a) In General-Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 200e-2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection:

"(m) Except as otherwise provided in this title, an unlawful employment practice is established when then complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

(b) Enforcement Provisions-Section 706 (g) of such Act (42 U.S.C. 200de-5(g)) is amended-

(1) by designating the first thorough third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2) (A) and indenting accordingly;and

(3) by adding at he end the following new subparagraph:

(B) On a claim in which an individual proves a violation uder section 703(m) and a respondent demonstrates that the respondent would have taken thesame action in the absence of the impermissible motivating factor, the court-

"(1) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees adn costs demonstrated to be directly attributable only to the pursuit ofa claim uder section 703(m); and

"(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A)."

Supreme Court, U.S.
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No. 98-1551

IN THE

Supreme Court of the United States

NURAINI B. ABIOYE,

Petitioner,

v.

SUNDSTRAND CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Respondent, Sundstrand Corporation, has no parent companies and there are no publicly held companies that own 10% or more of its stock.

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REASONS FOR DENYING THE WRIT

The present Petition for Certiorari fails to demonstrate the necessity for exercise of this Court's extraordinary and discretionary power over this matter. Petitioner's arguments are, at their crux, a disagreement with the misapplication of an appropriate and consistently recognized legal standard relative to employment discrimination matters.

I.

THE LOWER COURTS PROPERLY APPLIED THE *McDONNELL DOUGLAS* EVIDENTIARY FRAMEWORK TO PETITIONER'S AGE DISCRIMINATION CLAIM.

Petitioner's primary argument in support of his request for certiorari in the present matter purports to be an assertion that the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit improperly utilized the *McDonnell Douglas*[1] evidentiary framework in analyzing Petitioner's claims of age discrimination. However, Plaintiff fails to articulate any specific legal basis for his assertions in this regard except to complain that this Court has not "formally" approved the application of *McDonnell Douglas* to a claim of age discrimination brought under the Age Discrimination in Employment Act.[2]

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1. *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

2. Age Discrimination in Employment Act, 29 U.S.C. § 623 *et. seq.*

A. The Lack of "Formal" Approval of *McDonnell Douglas* in an Age Discrimination Claim Does Not Invalidate Its Use.

This court has recognized that the *McDonnell Douglas* burden shifting methodology is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1978). The purpose of such method of proof is to help an alleged victim of discrimination overcome a number of proof problems inherent in a case which turns upon the intent of the alleged perpetrator. However, the use of such method of proof is not intended to and does not alter the basic burdens of proof imposed on a plaintiff in a civil action. The plaintiff still must prove intentional discrimination. Accordingly, there is no reason why such a "sensible, orderly" approach should not be used in an age discrimination matter.

Petitioner suggests that Justice Scalia's statement in *O'Connor v. Consolidated Coin Caterers*, 517 U.S. 308 (1996), "[w]e have never had occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it," is an indication of disapproval of the *McDonnell Douglas* formulation. This tortured reading of the *O'Connor* decision does not support Petitioner's position. Indeed a review of *O'Connor* and the cases cited therein demonstrates that the *McDonnell Douglas* method of proof is properly applied to an ADEA claim.

This Court cited *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 n.1 (1993) as analogous authority for the assumption that *McDonnell Douglas* applied to an ADEA

claim. The *Hicks* Court assumed, without deciding, that *McDonnell Douglas* applied to 42 U.S.C. § 1983 actions. *Hicks*, in turn, cited as analogous authority *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), wherein this Court ruled that *McDonnell Douglas* applies to 42 U.S.C. § 1981 claims, explaining:

> We have developed, in analogous areas of civil rights law, a carefully designed framework of proof to determine, in the context of disparate treatment, the ultimate issue whether the defendant intentionally discriminated against the Plaintiff. We agree with the Court of Appeals that this scheme of proof, structured as a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," should apply to claims of discrimination under § 1981.

491 U.S. at 186 (citations omitted).

The chain of legal analogies back to *Patterson* (and *Furnco*), as cited in *O'Connor*, suggests that the "carefully designed framework of proof" is properly applicable to ADEA claims. The ADEA is an analogous area of civil rights law for which the *McDonnell Douglas* method of proof is a "sensible, orderly way to evaluate the evidence." There is, therefore, no need for this Court to grant Petitioner's request for a writ of certiorari simply to "formally" endorse this chain.

When the ADEA was enacted in 1967, its substantive prohibitions were derived *in haec verba* from the language of Title VII. *Lorillard, A Division of Loew's Theatres, Inc.*

v. Frances P. Pons, 434 U.S. 575, 584 (1978). The ADEA and Title VII, from the enactment of the ADEA, shared nearly identical prohibitions on discrimination and shared a common aim of preventing discrimination in the workplace. *McDonnell Douglas* was decided by this Court in 1973. By 1974, the federal courts, recognizing the similarities between Title VII and the ADEA, had begun to apply *McDonnell Douglas* to ADEA claims. *See, e.g., A.P. Wilson v. Sealtest Foods*, 501 F.2d 84 (5th Cir. 1974). Since that time, the circuit courts have evaluated claims under the ADEA using *McDonnell Douglas*. *See, e.g., Fisher v. Wayne Dalton Corp.*, 139 F.2d 1137 (7th Cir. 1998); *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078 (6th Cir. 1994); *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993); *Levin v. Analysis & Technology Inc.*, 960 F.2d 314 (2nd Cir. 1992); *Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407 (9th Cir. 1981); *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980); *Loeb v. Textron*, 600 F.2d 1003 (1st Cir. 1979); *Schwager v. Sun Oil Co. of Pennsylvania*, 591 F.2d 58 (10th Cir. 1979); *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Petitioner does not provide any legitimate or reasonable basis for his position advocating abandonment of this uniform body of case law.

Petitioner points out that Congress has not taken the opportunity to amend the ADEA to authorize the use of *McDonnell Douglas*. More to the point, however, is Congress' decision not to prohibit such use despite making other amendments to the ADEA. Congress has in the past specifically amended discrimination statutes to address those matters on which they believed the case law was incorrect. For example, with the Civil Rights Act of 1991,

Congress amended Title VII in reaction to this Court's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *See* 29 U.S.C. §§ 2000e-2(m), 2000e-5(g)(z). Accordingly, where Congress perceives a problem with the development of case law, it acts. Congress has not acted with regard to the application of *McDonnell Douglas* to ADEA claims, providing tacit support for its use.

B. There Is No Split of Authority in the Circuit Courts Regarding the Elements of the *McDonnell Douglas* Test.

Petitioner's next claim of error is that the lower Court erred in applying *McDonnell Douglas* by using the wrong pretext standard to find that he had not established a *prima facie* case of discrimination.[3] In support of this claim Petitioner asserts the existence of a split of authority among the Circuit Courts of Appeals as to the application of this Court's holding in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993). Petitioner suggests that some circuits continue to apply the pretext plus and pretext only standards

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3. Petitioner appears to confuse the *prima facie* and pretext standards and the lower court rulings on same. For purposes of clarification, the District Court found that Petitioner failed to establish a *prima facie* case of discrimination because he failed to present sufficient evidence to establish that he was performing according to Respondent's reasonable expectations. Appendix to Petition at 20a (hereinafter "Appendix") With respect to pretext, the District Court stated "there is simply no evidence of pretext in this case." Appendix at 21a. The Seventh Circuit agreed that Petitioner had not met his burden of proof on his *prima facie* case, but also went on to consider the issue of pretext. Appendix at 6a-7a. The Seventh Circuit held that Petitioner had failed to present sufficient evidence to establish a genuine issue of material fact as to pretext. Appendix at 8a.

despite this Court's express rejection of those standards and approval of the permissive pretext standard in *Hicks*.

Petitioner's argument, however, is fatally flawed by his misunderstanding of the holdings of the cases cited in his brief which he claims demonstrate a split of authority. A review of the cases cited establishes that, in fact, the circuits cited by Petitioner have all recognized this Court's dictate in *Hicks* and all apply the permissive pretext standard set forth therein.

Petitioner first cites to *Sheridan v. E. I. Du Pont de Nemours & Co.*, 100 F.3d 1061, 1067, 1078 (3d Cir.) (*en banc*), *cert. denied*, 117 S. Ct. 2532 (1997), and states that the Third Circuit has adopted the "pretext only" methodology. This is incorrect. In *Sheridan*, the Third Circuit expressly recognized the "permissive pretext" standard set forth in *Hicks*, stating that the elements of the *prima facie* case combined with a disbelief of proffered reasons allow, but do not require a finding of intentional discrimination. *Sheridan*, 100 F.3d at 1066-67. In the Third Circuit, a plaintiff can avoid summary judgment by producing sufficient evidence as to whether the employer's proffered reasons for the challenged employment action were false. *Id.* The Third Circuit noted the agreement of numerous other circuits, including the Seventh Circuit, on this issue.

With regard to the Fourth Circuit, curiously Petitioner cites to this Court's opinion in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996). While Petitioner repeatedly references the Fourth Circuit position, he fails to cite to any opinion by that court.

The Petitioner correctly notes that the Sixth Circuit has adopted the permissive pretext approach mandated by *Hicks*, citing *Kline v. Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997). However, Petitioner does not suggest how this standard differs from that of other circuits and, indeed, it does not. Thus, *Kline* provides no support for Petitioner's allegations of a split of authority.

Petitioner also claims to be able to avoid summary judgment under the standards applied by the Eighth Circuit, citing *Ryther v. KARE 11*, 108 F.2d 832 (8th Cir. 1997), *cert. denied*, 117 S. Ct. 2532 (1997), but again fails to actually identify the standard applied. A review of the case reveals that the standard is, in fact, permissive pretext. *Ryther*, at 836. This is, of course, the standard applied to Petitioner's case by the lower courts; he was unable to prevail under such standard.

Petitioner's representation of the Ninth Circuit standard as "pretext only" is simply incorrect. In *Warren v. City of Carlsbad*, 58 F.3d. 439, 443 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996), the Court noted that Plaintiff need produce very little evidence of discriminatory motive to avoid summary judgment on pretext, but held that the mere existence of a *prima facie* case was not enough. Indeed, the Court stated that a plaintiff "must produce evidence of facts that either directly show a discriminatory motive or show that the [employer's] explanation for his rejection is not credible." *Id.* at 443. The other Ninth Circuit case cited by Petitioner, *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 369 (1996), was brought pursuant to a state law anti-discrimination statute, not under a federal civil rights statute. However, the court reiterated the *Hicks* standard and affirmed a grant of

summary judgment because the plaintiff failed to offer "sufficiently probative" evidence of pretext. *Id.* at 918.

Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 685 (1998), is cited by Petitioner as further evidence of a split in the circuits. Petitioner represents that the *Combs* court rejected the pretext plus standard and that he could have prevailed in the Eleventh Circuit. Again, Petitioner fails to actually indicate what the standard is — permissive pretext. What Petitioner fails to bring to this Court's attention is the *Combs* court's lengthy discussion of the rulings of various circuit courts on the pretext issue, noting that eight other circuits have interpreted *Hicks* to mean that evidence sufficient to discredit defendant's proffered reasons for his actions, when considered with plaintiff's *prima facie* case, is sufficient to allow, but not require, a finding of discrimination. *Combs*, 106 F.3d at 1535-36, citing cases from the Third, Fourth, Sixth, Seventh, Eighth, Ninth and District of Columbia Circuits. The *Combs* court further noted that while the First and Fifth Circuits, in dicta, have made comments "arguably inconsistent" with the foregoing, the holdings of those courts were actually consistent with the rest of the circuits that had considered the issue. *Id.* at 1536, citing *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994) and *Rhodes v. Gruberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996).

Finally, Petitioner asserts that the Seventh Circuit has adopted and used the pretext plus standard. Petition at 13-14. This is patently incorrect. The Seventh Circuit, as noted by the *Combs* decision, has expressly held that direct evidence of discrimination is not required at the pretext stage of the *McDonnell Douglas* method. Rather, discrimination can be inferred (but is not compelled) from a finding that

the employer's proffered reasons for their actions were spurious. *See, e.g., Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1399 (7th Cir. 1997); *Perdom v. Browner*, 67 F.3d 140, 146 (7th Cir. 1995). Accordingly, as the Seventh Circuit noted in its opinion in this case, in order to avoid summary judgment a plaintiff must provide evidence which would raise an issue of fact as to whether the employer's proffered reason was a lie. Appendix at 7a, citing *Bahl v. Royal Indem. Co.*, 115 F.3d 1283, 1291-92 (7th Cir. 1997). This is the standard advocated by Petitioner (Petition at 14) and is consistent with that utilized by other circuit courts. Accordingly, Petitioner's attempt to create a conflict in the circuits necessitating this Court's involvement must fail.

II.

MISAPPLICATION OF *McDONNELL DOUGLAS* DOES NOT SUPPORT A GRANT OF THE PRESENT PETITION FOR CERTIORARI.

Interwoven in the present Petition for Writ of Certiorari is Petitioner's attack on the analysis performed by both lower courts utilizing the *McDonnell Douglas* burden shifting approach. (Petition at 12, 14-16)[4] This Court has long indicated that such an attack does not justify invoking this Court's powers to grant a petition for writ of certiorari. *See, e.g., National Labor Relations Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 502-03 (1951) (stating that certiorari is granted only ". . . where there is a real and

4. Although not clearly stated, presumably Petitioner does not contest the applicability of *McDonnell Douglas* to his race and national origin discrimination claims. Accordingly, the sole basis for his request for certiorari on those claims is that the lower courts were wrong in analyzing his claim pursuant to McDonnell Douglas.

embarrassing conflict between the circuit courts of appeal" and should be denied where the petition is seeking only a "fair assessment of the record on the issue of unsubstantiality . . .") (citations omitted); *General Talking Pictures Corp. v. Western Electric Company*, 304 U.S. 175, 178 (1938) (holding that a writ of certiorari is not granted merely to review evidence or inferences drawn therefrom) (citations omitted).

Petitioner's arguments regarding misapplication of *McDonnell Douglas*, focusing primarily on various evidentiary rulings made by the District Court and affirmed by the Seventh Circuit, do not form a basis for this Court's grant of certiorari.

III.

THE LOWER COURTS WERE CORRECT IN NOT APPLYING A MIXED MOTIVE ANALYSIS TO THE PRESENT MATTER.

Petitioner's final argument is that the lower courts improperly failed to apply a mixed motive analysis to his case. Petitioner's argument in this regard is puzzling. A mixed motive analysis presumes the existence of a legitimate motive coupled with an illegitimate motive. Petitioner has not, at any time during the course of this litigation, conceded (even for purposes of argument) that any of Respondent's stated bases for its actions were legitimate.

Regardless, the lower courts properly articulated the mixed motive doctrine and properly declined to apply it to the present matter. The Seventh Circuit opinion explained

that a mixed motive analysis is applicable where the plaintiff is able to present either direct or circumstantial evidence that the challenged employment action was a result of intentional discrimination. Appendix at 8a-9a. If a plaintiff makes such a showing, the employer can limit its liability by proving that the same decision would have been made absent the discriminatory motive. *Id.* Again, as with Petitioner's arguments on pretext, he is challenging the court's conclusion under a properly stated and analyzed rule of law. Such a challenge is not an appropriate basis for seeking certiorari. *General Talking Pictures*, 304 U.S. at 178.

Petitioner failed to present either direct or circumstantial evidence sufficient to trigger a mixed motive analysis. Petitioner's claims of evidence of a "pattern of discriminatory treatment" are simply insufficient in this regard. None of the "evidence" asserted by Petitioner suggests, let alone mandates, the applicability of a mixed motive analysis.[5] Indeed, Petitioner cites to nothing more than a series of perceived slights that demonstrate no relationship to his race, national origin or age. Moreover, scattered examples of alleged unequal treatment, without more, simply do not provide any support for allegations of bias. *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1141 (7th Cir. 1997); *Kuhn v. Ball State*, 78 F.3d 330, 332 (7th Cir. 1996).

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5. Petitioner cites to two paragraphs contained in Alex Krinickas' affidavit at footnotes 18 and 23 of the Petition. These paragraphs were stricken by the District Court prior to its ruling on the motion for summary judgment. Petitioner makes no substantive arguments regarding the admissibility of such evidence.

Petitioner's reliance on the alleged unequal use of an assessment test is similarly misplaced. Petitioner failed to provide this Court with the following information: 1) that this event occurred in 1993, two years before his termination; 2) that the test was given to all engineers; 3) that the request to take the test was made by someone not involved in his termination; and 4) that the test was nullified based upon an investigation by Human Resources prompted by Petitioner's reports of inconsistent application.[6] This remote event simply does not support a finding of discriminatory motive sufficient to trigger a mixed motive analysis.

Additionally, use of the test was discontinued in 1993. Petitioner did not file a charge at that time and did not, in his charge or complaint in the present action, allege disparate impact. Accordingly, such a claim is untimely and not properly before this Court.

CONCLUSION

For the foregoing reasons, Respondent respectfully prays that this Court deny the Petition for Writ of Certiorari in the present matter.

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6. R.20, Ex. 6, Abioye Tr. 140, 146.

Respectfully submitted,

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